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No. 91-345

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOOSIER ENERGY RURAL ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

INDIANA DEPARTMENT OF STATE REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Supreme Court

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PETITIONER'S REPLY MEMORANDUM

GERALD P. NORTON
(Counsel of Record)
JAMES G. RAFFERTY
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

J. DAVID HUBER
ZOERCHER, HUBER & MCENTARFER
727 Main Street
Tell City, IN 47586
(812) 547-7081
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY MEMORANDUM [1]

In its opposition ("Opp.") respondent is unable to dispute that the questions presented by the petition are substantial and important, or that there are conflicts in the case law and a need for this Court's guidance on those questions. Instead, respondent attempts to argue that the questions framed in the petition are not really presented in this case, and also attacks strawmen by addressing questions petitioner has not raised.

For example, respondent argues that the Due Process Clause did not preclude Indiana from imposing some tax on the sales of intangible property (Opp. 5), although petitioner has not contended that it does so. The issue is not whether Indiana has authority to impose *some* tax on petitioner's sales of intangible property in New York,

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[1] *See* Rule 29.1 statement at Pet. 1 n.1.

but whether Indiana *alone* may do so and the extent to which it may do so.[2]

Respondent also claims that petitioner has criticized the state courts here "for adopting the *Complete Auto* test" (Opp. 5), but that is not the case. Rather, petitioner challenges the state courts' disregard of or improper application of the principles of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and its progeny, including *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), and *Exxon Corp v. Department of Rev.*, 447 U.S. 207 (1980). Similarly, respondent argues at some length that the Indiana tax satisfies the "internal consistency" requirement discussed in some of this Court's decisions (Opp. 7-8), but petitioner has not argued otherwise.[3]

Under the decision below, interstate sales in New York of intangible property that is part of a taxpayer's unitary business may be taxed on an unapportioned basis solely by Indiana based on the property's "situs," even

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[2] As Justice Stevens noted in *Goldberg v. Sweet*, 488 U.S. 252 (1989), the fact that "one State through which interstate commerce flows may not constitutionally tax such commerce does not mean that another State may make up for the gap, as it were, by taxing its share as well as the first State's share." *Id.* at 270 n.3 (Stevens, J., concurring).

[3] Respondent's invocation of the "internal consistency" doctrine, however, reflects confusion about that doctrine's role. It was developed essentially as a means of assessing "whether a tax is fairly apportioned . . . ." *Goldberg*, 488 U.S. at 261. Indiana's tax is not apportioned at all. Moreover, respondent's reading of *Goldberg* conflicts with this Court's decision in *Mobil*, where the Court held that one state's tax based on commercial domicile was not immune from the need for apportionment to avoid potential multiple taxation through taxation of the same income by a nondomiciliary state. Nothing in *Goldberg* or the other cases cited in *Goldberg* or by respondent indicates any intention to undermine this thrust of *Mobil*, which was cited with approval in *Goldberg*. 488 U.S. at 259-60 nn.11, 12. If anything, respondent's argument demonstrates the need for the Court to clarify the law in this area, a need evidenced by the equal division of the Court in *Ford Motor Credit Co. v. Department of Revenue*, 111 S.Ct. 2049 (1991).

though New York concededly has sufficient nexus with the sales to satisfy due process requirements for taxation thereof. Respondent acknowledges that the Indiana tax does not have "a legislatively apportioned-type structure" (Opp. 10), and does not dispute that the decision below is unprecedented in sustaining an unapportioned tax on gross income from interstate sales of property, based on the "situs" of the property.[4] Respondent simply ignores *Mobil* and other decisions of this Court rejecting taxation based on such fictions as situs (*see* Pet. 10-13).

Respondent asserts in this connection that, in determining the taxing jurisdiction of the market state, the focus of analysis must be on "the activity which generated the income," here conceded by respondent to be "a sale of intangible [property rights]" (Opp. 10). Respondent does not deny that the relevant "activity," *i.e.*, the sale, took place entirely in New York. Instead, respondent abandons its own premise and says in effect that the focus should be on the activity that gave rise to or created the property that was sold (*id.*). Under respondent's view, if a company made a product in Indiana and took it to New York for sale at a specialized market for such property, the gross income would be taxable only by Indiana, and not at all by New York. Respondent cites no authority for such a rule, and this Court's decisions suggest the contrary. *See, e.g., McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), and cases

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[4] All but abandoning the reasoning of the Indiana Supreme Court, respondent now relies primarily upon *Goldberg*, which the Indiana Supreme Court did not even discuss. But *Goldberg* did not involve fictional situs doctrines; it involved an excise tax, not a gross income tax; and, unlike the Indiana tax, it was legislatively apportioned through a tax credit provision by which "actual multiple taxation is precluded." 488 U.S. at 265. Respondent asserts, erroneously, that "this Court in *Goldberg* did not require Illinois to apportion its tax . . ." (Opp. 10). In fact, based on events in the taxing state, in *Goldberg* this Court "h[e]ld that the Tax Act is fairly apportioned." 488 U.S. at 265. As noted, the Indiana tax is not apportioned at all (Opp. 10).

cited at Pet. 19 n.32. Indeed, respondent's confusion confirms the need for further guidance by the Court in this important area.

As to the questions presented concerning the "unitary business" concept [5] and the nexus requirement under the Commerce and Due Process Clauses,[6] respondent acknowledges that these issues are "related" to this case but asserts that they are not "germane" to the outcome (Opp. 5).[7] However, these issues are plainly germane. Thus, if the Indiana Supreme Court had ruled that the "unitary business" principle did not preclude New York from taxing petitioner's sales of intangible property in New York, the decision below could not stand. The same would be true if the Court below had found not only (as it did) that a tax by New York on such sales would satisfy the nexus and relationship requirements of the Due Process Clause, but also that such a tax would satisfy the similar requirements of the Commerce Clause. These issues are not only germane but dispositive in this case, and respondent makes no effort to contend either that they are not important or that they were correctly decided below. These issues are squarely presented here and merit resolution by this Court.[8]

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[5] *See* Pet. 14-16.

[6] *Id.* at 17-20.

[7] Respondent itself elsewhere raises the issue (Opp. 9-10), which it here denies is present in the case, whether the market state had nexus and relationship sufficient to support imposition of a tax on the instant sales.

[8] The Commerce Clause "nexus" issue presented here is different from and broader than the questions the Court will review in *Quill Corp. v. North Dakota*, No. 91-194, and *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, No. 91-119, which relate to the nexus requirements for state taxation of out-of-state sellers under the Due Process Clause and an Act of Congress. Nevertheless, although decisions in those cases are unlikely to address or resolve the "nexus" question presented here, it would be appropriate for the Court to grant certiorari in this case as well, so as to permit a more comprehensive consideration of related issues.

In sum, both tacitly and explicitly respondent has confirmed that the questions presented merit review.[9] The Court should grant the writ.

Respectfully submitted,

GERALD P. NORTON
(Counsel of Record)
JAMES G. RAFFERTY
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

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ZOERCHER, HUBER & MCENTARFER
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Tell City, IN 47586
(812) 547-7081

Counsel for Petitioner

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[9] We note that an unrelated question about the constitutionality of Indiana's taxation of intangibles is presented by the petition in *Felix v. Indiana Dep't of State Rev.*, No. 91-272. *Felix* concerns an entirely different tax, *i.e.*, the (now repealed) Indiana intangible property tax, rather than the gross income tax at issue in the instant case. The Court should grant the present petition regardless of its disposition of the petition in *Felix*.